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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-956

Supreme Court, U. S.
FILED
Dec 14 1972
MICHAEL RODAK, JR., CLERK

Edward Harris,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Edward Harris, pro se
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CITATIONS

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In the Supreme Court of the United States

October Term 1972

No. _____

Edward Harris,

Petitioner,

v.

Commissioner of Internal Revenue,

Respondent.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner Edward Harris, hereby petitions that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit in the above entitled case entered August 3, 1972, affirming the decision of the United States Tax Court.

OPINIONS BELOW

The findings of fact and opinion of the United States Tax Court are unofficially reported at 29 T.C.M. 1510. A motion for rehearing was denied on December 28, 1970. The decision was entered on March 22, 1971.

The decision and opinion of the United States Court of Appeals for the Ninth Circuit is not officially reported. A motion for rehearing was denied on September 15, 1972.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The petitioner was prevented from having a fair trial because of a bias and prejudice Tax Court. This was exhibited in three ways:

1. The Tax Court failed to follow it's own rules of practice.

2. The refusal of the Tax Court to accept material and relevant evidence.

3. The petitioner alleges that a great portion of the findings of fact and opinion in T.C. Memo. 1970-331 is not based on the record, evidence or testimony, not even based on supposition and conjecture but is based on the ability of the Tax Court to fabricate and manufacture untruths and lies.

The petitioner also questions the propriety of the Commissioner's actions in this case.

1. The withholding and suppression of evidence detrimental to his case.

2. In the preparation of the Stipulation of Facts, the Commissioner switched and substituted figures different than those agreed upon in the stipulation conference.

3. The Commissioner is using the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws in an inconsistent, contrary and contradictory manner. The results of the audit and examination of the petitioner's records for the calendar year 1963 indicates he approved the petitioner's entitlement to the Hazeltine building deductions.

4. The use of SURPRISE at the Tax Court trial. The Commissioner raised issues and grounds not stated in the notice of deficiency or the answer.

Therefore, the basic concepts of justice are at issue in this case.

STATUTES AND REGULATIONS INVOLVED

Rule 14(b), of the Rules of Practice of the United States Tax Court states, "that the answer shall be drawn so that it will advise the petitioner and the Court FULLY of the nature of the defense."

STATEMENT OF THE CASE

The sole reason that this case is before this Court is that the petitioner's individual rights are being trampled by judicial and administrative actions.

The original deficiencies were proposed in the Commissioner's letter dated March 11, 1968 totaled $5,674.23 for the calendar years 1964, 1965 and 1966. The explanation of adjustments stated net loss from rentals and investment loss were disallowed for lack of substantiation.

The petitioner was involved in the construction, operation and subsequent foreclosure of apartment buildings in the Los Angeles, California area.

On August 28, 1968 the petitioner presented to the IRS Appellate Conferee and a representative of the Regional Counsel a total of 294 cancelled checks and 107 other documents.

The Stipulation of Facts, pages 27-34 of the official record show that the pepitioner substantiated by 100% or greater the disallowed items as shown in his original tax return.

After the trial started in Los Angeles,

California on January 26, 1970, the Commissioner raised three new and false issues which WERE NOT stated in the notice of deficiency or the answer. These issues are as follows:

1. Interest income for the calendar year 1963. A year not at issue in this case.

2. Entitlement to deductions on the Hazeltine property.

3. Entitlement to depreciation on the Burbank property.

Judge Drennen in the Mississippi Steel Case, T.C. Memo. 1971-18 states "It is axiomatic that issues must be raised by written pleadings, and unless so pleaded, will not be considered."

The Commissioner has SURPRISED the taxpayer at the hearing by presenting grounds different from those in the deficiency notice.

It should be pointed out that the Commissioner presented no acceptable evidence to support his contention.

The Commissioner with evil intent and malice LIED to the Tax Court when he stated the petitioner's records were not examined for the calendar year 1963.

The Commissioner is unable to correct-

ly compute the tax liability for the years at issue before the Court. His computation in the notice of deficiency is 875% greater than his computation under the Tax Court rule 50 issue.

The petitioner presented eleven issues for review to the United States Court of Appeals for the Ninth Circuit. In that Courts opinion as shown on page 19, it comments on only one issue and DUCKS THE OTHER ISSUES the petitioner presented for review.

The United States Court of Appeals for the Ninth Circuit failed to notify the petitioner of the time and place of it's hearing.

The decision of the Tax Court to allow the Commissioner to present issues and grounds not stated in the notice of deficiency or thr answer is in conflict with other Tax Court and United States Court of Appeals decisions.

REASONS FOR GRANTING THE WRIT

The petitioner was prevented from having a fair trial because of a bias and prejudice Tax Court.

1. The Tax Court failed to provide the petitioner an opportunity to receive a copy of the transcript of proceedings at the calendar call on January 26, 1970. Begining on line 23 of page 39 of the official record, the Commissioner states: "The stipulation Mr. Harris referred to, in effect, stipulates the Government out of Court." The Stipulation of Facts that the Commissioner did sign, as shown on pages 27-34 of the official record, should stipulate the Government out of Court. This is proof beyond a reasonable doubt that the Commissioner does not have a case against the petitioner.

2. The petitioner alleges that his trial was not conducted in accordance with the rules of practice of the United States Tax Court. The petitioner specifically complains about the violations of the following rules of practice:

a. Rule 14(b).

This rule states "that the answer shall be drawn so that it will advise the pet-

itioner and the Court fully of the nature of the defense." The answer as shown on pages 9 and 10 of the official record, does not advise the petitioner and the Court fully of the nature of the defense that the Commissioner presented at the trial.

b. Rule 17(c)(1).

The MOTION FOR AMENDMENT TO ANSWER, as shown on page 23 of the official record pointed out the defects complained of and the details desired.

c. Rule 31(b)(6).

The Court may set aside a stipulation in whole or in part where justice requires, but otherwise will not receive evidence tending to qualify, change or contradict any fact properly introduced into the record by stipulation. A portion of paragraph 15 of the Stipulation of Facts as shown on page 31 of the official shows a deduction of $4,050.00 for depreciation for the Burbank property for the calendar years 1965 and 1966. The Commissioner did not introduce any evidence to permit the Tax Court to qualify, change or contradict any fact properly introduced into the record by stipulation. The issue

of depreciation deductions on the Burbank building were not shown on the notice of deficiency or the answer and therefore must not be an issue at this time. The petitioner refers the Court to T.C. Memo. 1971-18 which states "It is axiomatic that issues must be raised by written pleadings, and, unless so pleaded, will not be considered." The Tax Court has arbitrarily, erroneously and irrationally as shown on page 64 of the official record, allowed the petitioner only one-half of the depreciation of $4,050.00 as shown in the Stipulation of Facts.

d. Rule 32.

The burden of proof, on issues not pleaded, must be on the Commissioner. The Stipulation of Facts, pages 27-34 of the official record, proves that the petitioner has substaniated over 100% of the disallowed rental and investment loss, as stated in the notice of deficiency and the answer. The Commissioner by raising new and false issues has made allegations concerning matters on which the burden of proof is placed upon him by statute. Sam Cook 25 BTA 92 (1932).

e. Rule 50.

The petitioner is entitled to pay the lowest tax for the years at issue before the Court, according to the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws. The Tax Court is derelict in it's duty by accepting the respondent's computation in the Tax Court rule 50 issue. The use of form 1040G, the income averaging form would of reduced the stated tax by approximately fifty percent. Futhermore, the Commissioner omitted many allowable deductions. The Tax Court has stated on page 69 of the official record that the notice of deficiency is in error. Therefore, it is not incumbent on the taxpayer to show that he owes no tax or to show what amount of tax he does owe.

3. The petitioner complains and alleges that the Commissioner has infringed, deprived and denied the petitioner a portion of his constitutional rights.

a. The petitioner was informed of new accussations after his trial began.

b. The Commissioner's use of SURPRISE prevented the petitioner from being represented and assissted by counsel in

his defense.

c. The Commissioner's use of SURPRISE prevented the petitioner from having witnesses to testify in his behalf.

4. The petitioner objects to new and false issues raised after his trial began. These new and false issues are as follows:

a. Interest income for the calendar year 1963.

b. Entitlement to Hazeltine building deductions.

c. Entitlement to Burbank building depreciation.

The petitioner refers the Court to T.C. Memo. 1971-18 which states "It is axiomatic that issues must be raised by written pleadings, and, unless so pleaded, will not be considered." The Commissioner should allege in his answer any additional deficiency and then state the specific grounds which form the basis of such deficiency.

Nor may the Commissioner surprise the taxpayer at the hearing by presenting grounds different from those in the deficiency notice. The petitioner cites the following cases: Hormel v. Helvering, 312,U.S. 552, 61 S. Ct. 154, 85 L. Ed. 1037 (1939); Helvering v. Tex-Penn Oil Co., 300 U.S. 481. 57 S.

Ct. 569, 81 L. Ed. 755 (1937); Comm. v. Chelsea Products, Inc., 197 F.2d. 620 (3d Cir. 1952); Moore v. Comm., 202 F. 2d 45 (5th Cir. 1953); Anderson v. Comm., 156 F. 2d 591 (2d Cir. 1946); W.E. Weaver, 32 T.C. No. 40 (1939); Meyer Katz, 46 B.T.A. 187, aff'd, 139 F.2d 107 (7th Cir. 1943).

5. The Commissioner suppressed evidence detrimental to his case. The suppressed document is the American Savings and Loan Association 1963 Loan history statement regarding the Hazeltine building. A copy of this document is shown as page 23 of the Appellant's opening brief.

6. The refusal of the Tax Court to accept material and relevant evidence. This evidence is listed as Exhibit 23 of the official records, a copy of cashier's check #945095 in the amount of $1,051.00 which represents the January 1965 payment on the Hazeltine building.

7. The petitioner's repudiation of portions of paragraph 15 of the Stipulation of Facts. In the stipulation conference, the petitioner submitted documentation in support of the full amounts of interest, property taxes and "repairs and other ex-

penses" as shown in Exhibits 12 and 13. Paragraph 15 in the Stipulation of Facts, as shown on page 31 of the official record, show that the Commissioner in the preparation of this manuscript switched and substituted figures of the petitioner's original returns. Pages 26-33 of the Appellant's opening brief show the documentation submitted to the Commissioner.

8. The arbitrarily, erroneously and irrationally findings of fact and opinion by the Tax Court. On pages 36-39 of the Appellant'a opening brief are cited numerous instances where the Tax Court has fabricated and manufactured untruths and lies from the available record, evidence and testimony.

9. Tax Court Exhibit 15 is the results of the audit and examination of the petitioner's records for the calendar year 1963. The Commissioner has approved entitlement to the Hazeltine deductions in this audit. The Commissioner is now using the provisions of the Internal Revenue Code as amended by Revenue Acts and other Public Laws in an inconsistent, contrary and contradictory manner.

CONCLUSION

For the reasons stated, Petitioner respectivelly submits, that the petition for certiorari be granted.

Respectivelly submitted,

Edward Harris

Edward Harris, pro se

October 10, 1972

APPENDIX

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT , CLERK

RD HARRIS,

Petitioner and Appellant,

vs.

MISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

No. 71-1904

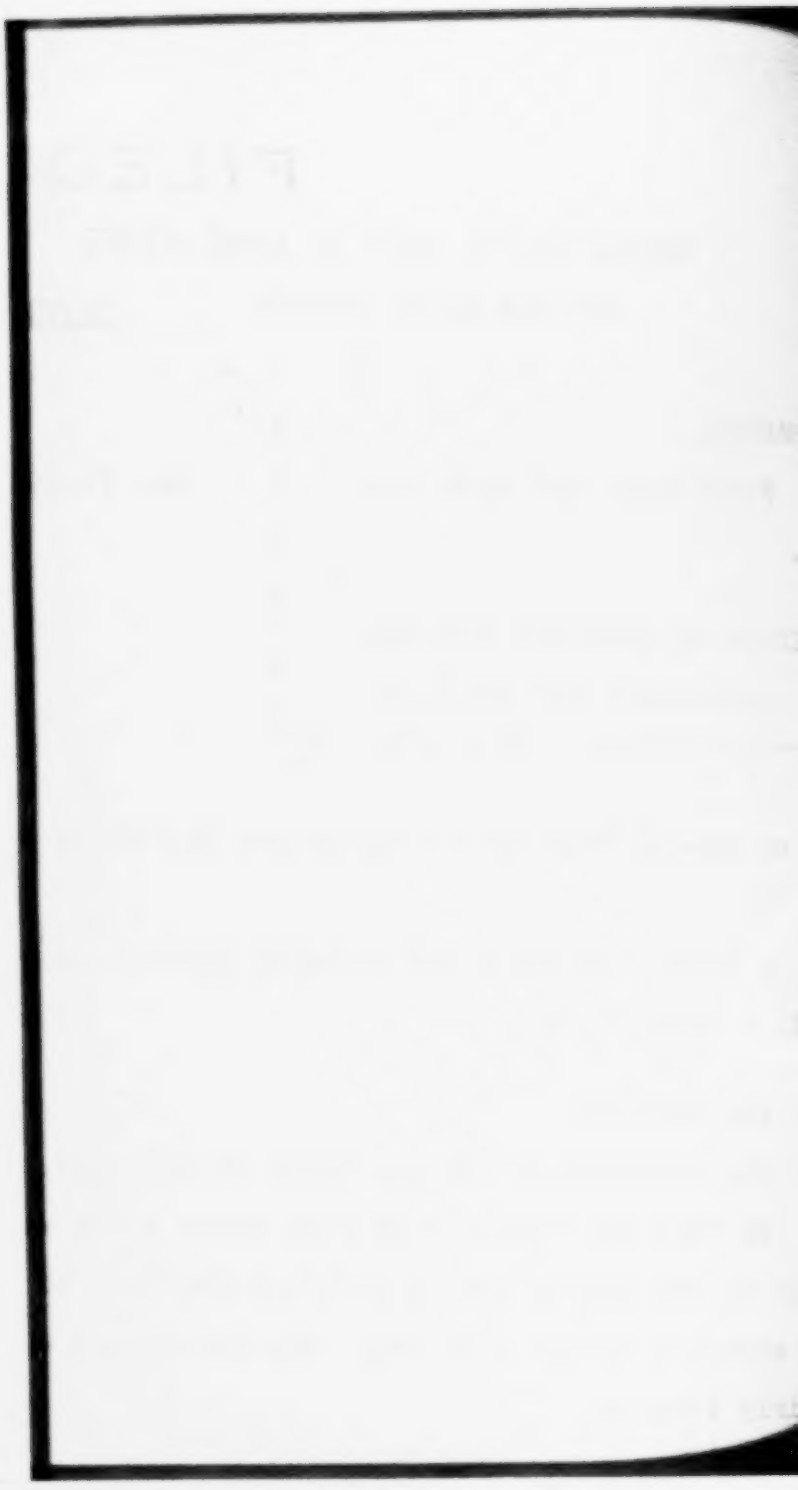
On Appeal from the United States Tax Court

Before: CHAMBERS and KOELSCH, Circuit Judges, HILL, District Judge.

Per curiam:

The decision of the tax court is affirmed.

We find the findings of that court to be well ported in the record and do not find the lack of du cess asserted by the taxpayer. The petitioner was y fairly treated.



argument, contends that respondent has completely failed to raise any issue other than that petitioner was not entitled to file a consolidated return with Flowood, and since respondent conceded that issue in his original brief, there remains no issue for us to decide. While respondent did not address himself to this question on brief, he did contend in oral argument on July 29, 1970, that the notice of deficiency was broad enough to cover the built-in loss issue and that therefore that issue is properly before the Court.

It is axiomatic that issues must be raised by written pleadings and, unless so pleaded, will not be considered. Samuel E. Hirsch, 16 TC 1275, 1279 (1951). We must therefore look solely to the written pleadings filed in this case to determine if the built-in loss issue under section 1.1502-31A(b)(9), Income Tax Regs., has been properly raised so that it can be considered in our redetermination of the deficiencies herein.

An issue has been defined as "a single, certain and material point, arising out of the allegations or pleadings of the parties, and generally, should be made up by an affirmative and negative." Simonton v. Winter, 30 U.S. 141, 148. Upon close perusal of the notice of deficiency,[1] petition, and answer, we are convinced that the only issue raised by the pleadings is whether petitioner is entitled to file a consolidated return with Flowood. We find no inkling whatsoever of an issue dealing with the disallowance of the losses on the sale of the Pinola and Texas farms under section 1.1502-31A(b)(9).

Respondent maintains that the phrase "and the claimed deduction of $227,251.44 resulting from the sale of assets of that corporation is not allowable" contained in the notice of deficiency places at issue his determination that the claimed losses of $227,251.44 are not allowable. He further maintains that the statement in the notice of deficiency that petitioner was not entitled to file a consolidated return with Flowood because there was no business purpose for the acquisition by petitioner of Flowood is simply one reason stated in the notice of deficiency for his determination that the losses were not allowable. In this regard, he points to the well-established principle in this Court that the reasons given in the notice of deficiency do not constitute the issue and the presumption of correctness which attaches to respondent's determination is not destroyed if the reasons are unsound or badly expressed. Max Schuster, 50 T.C. 98 (1968); Wilkes-Barre Carriage Co., 39 T.C. 839 (1963); Estate of Peter Finder, 37 T.C. 411 (1961); Standard Oil Co., 43 B.T.A. 973, affd. 129 F.2d 363 [29 AFTR 891] (C.A. 7, 1942); James P. Gossett, 22 B.T.A. 1279, 1284, affd. 59 F.2d 365 [11 AFTR 510] (C.A. 4, 1932); Edgar M. Carnrick, 21 B.T.A. 12.

We disagree with respondent, however, that the notice of deficiency is framed to raise the issue of the deductibility of the losses under section 1.1502-31A(b)(9), Income Tax Regs. In our opinion the "single, certain and material point" arising out of the notice of deficiency is the right of petitioner to file a consolidated return with Flowood. Even if we read the two clauses in the explanatory sentences in the disjunctive rather than the conjunctive, as respondent suggests we do, neither clause read separately would suggest any issue other than the right of petitioner to file a consolidated return with Flowood. While we recognize that respondent is not always limited to the reasons given in the statutory notice for disallowance of a deduction, we do think that if he is relying on an issue not raised by the statutory notice or on a reason diametrically opposite to the reason given in the statutory notice, or at least substantially different from that reason, which would require proof of entirely different

[1] In Federal income tax cases filed in this Court, the notice of deficiency is the foundation for issues; yet prior to the filing of a petition the notice of deficiency is not a part of the pleadings or record in a Tax Court case. The petition thus becomes the original pleading in a Tax Court case. Rule 7, Tax Court Rules of Practice. While there has been some uncertainty about whether the notice of deficiency is a part of the pleadings or record in a Tax Court case, without the notice of deficiency it would be impossible for this Court to redetermine the correctness of the deficiencies determined by the Commissioner. Hence, it is clear that when a copy of the notice of deficiency is attached to the petition, as required by Rule 7(c)(4)(E) of the Tax Court Rules, either when originally filed or by direction of the Court pursuant to the aforementioned rule, the notice of deficiency and any statement attached thereto becomes a part of the pleadings and/or record in a Tax Court case. Here, the notice of deficiency with a statement attached was appended to the petition and is therefore a part of the pleadings in this case.

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CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ND HARRIS,

Appellant,

vs.

No. 71-1904

ISSIONER OF
NAL REVENUE,

Appellee.

ORDER

re: CHAMBERS and KOELSCH, Circuit Judges, and MILL
District Judge.

The motion for rehearing is denied.

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